Supreme Court, U.S.
FILED
SEP 16 2005
OFFICE OF THE CLERK

No. 05-366

IN THE

SUPREME COURT OF THE UNITED STATES

In re David L. Smith,

Petitioner.

On Petition for a Writ of Mandamus and/or Prohibition to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF MANDAMUS AND/OR PROHIBITION

M. JULIA HOOK
Counsel of Record for Petitioner David L. Smith

5800 East 6th Avenue Parkway
Denver, Colorado 80203
303-321-7403

QUESTION PRESENTED FOR REVIEW

Whether a circuit court of appeals may deny an attorney the right to apply for reinstatement to its bar for his failure (if any) to pay harsh and unjustified sanctions imposed against him more than twelve (12) years ago without due process of law.

LIST OF PARTIES

David L. Smith, Petitioner

United States Court of Appeals for the Tenth Circuit, Respondent

Tenth Circuit Judge Michael R. Murphy, Respondent

Tenth Circuit Judge Terrence L. O'Brien, Respondent

Tenth Circuit Clerk Patrick Fisher, Respondent

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW..... i

LIST OF PARTIES..... ii

TABLE OF CONTENTS..... iii

TABLE OF CITED AUTHORITIES..... iv

CITATIONS OF OFFICIAL AND
UNOFFICIAL REPORTS..... v

STATEMENT OF THE BASIS FOR
JURISDICTION IN THIS COURT..... vi

CONSTITUTIONAL PROVISIONS,
ETC. INVOLVED IN THE CASE..... vii

STATEMENT OF THE CASE..... 1

ARGUMENT..... 9

CONCLUSION..... 12

APPENDIX..... Attached

TABLE OF CITED AUTHORITIES

Constitution of the United States,
Amendment 1. . . . . 4, 7, 10

Constitution of the United States,
Amendment 5. . . . . 5, 7, 10

28 U.S.C. § 1654. 11

Plan for Attorney Disciplinary Enforcement
of the United States Court of Appeals for
the Tenth Circuit, Section 10.2. 9

Plan for Attorney Disciplinary Enforcement
of the United States Court of Appeals for
the Tenth Circuit, Section 10.5. . . . . 2, 6, 8, 10

In re David L. Smith, 10 F.3d 723 (10th Cir.),
cert. denied, 513 U.S. 807, *reh'g denied*,
513 U.S. 1033 (1994) 1, 3, 8

In Re David L. Smith, 76 F.3d 335 (10th Cir.),
cert. denied, 519 U.S. 988 (1996) 1

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

None.

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The order sought to be reviewed was entered on August 30, 2005. The court of appeals specifically stated that "[n]o petition or motion for reconsideration of this order may be filed." The statutory provision believed to confer on this Court jurisdiction to review on mandamus and/or prohibition the order in question is 28 U.S.C. § 1651(a).

CONSTITUTIONAL PROVISIONS, ETC. INVOLVED IN THE CASE

Constitution of the United States, Amendment 1

Constitution of the United States, Amendment 5

Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit, Section 10.5

Petitioner David L. Smith, acting by and through counsel, M. Julia Hook, hereby files his Petition for a Writ of Mandamus and/or Prohibition:

STATEMENT OF THE CASE

On July 8, 2005, David L. Smith, an attorney in Denver, Colorado, attempted to file the following Petition for Reinstatement and Request for Evidentiary Hearing, requesting to be reinstated into the bar of the United States Court of Appeals for the Tenth Circuit.

1. On November 29, 1993, the Tenth Circuit disciplinary panel suspended Smith from the practice of law in the Tenth Circuit. *See In re David L. Smith*, 10 F.3d 723 (10th Cir.), *cert. denied*, 513 U.S. 807, *reh'g denied*, 513 U.S. 1033 (1994).

2. On February 13, 1996, the Tenth Circuit disciplinary panel disbarred Smith from the practice of law in the Tenth Circuit. *See In re David L. Smith*, 76 F.3d 335 (10th Cir.), *cert. denied*, 519 U.S. 988 (1996).

3. The following courts have suspended and/or disbarred Smith based on the Tenth Circuit's suspension and/or disbarment orders: the United States District Court for the District of Colorado; the Colorado Supreme Court; the United States

District Court for the Northern District of Texas; and the United States Court of Appeals for the Fifth Circuit. These courts have refused to reinstate Smith into their bars despite numerous applications for reinstatement. Further applications would be futile without reinstatement into the Tenth Circuit bar.

4. The following courts have declined to suspend and/or disbar Smith based on the Tenth Circuit's suspension and/or disbarment orders: the Supreme Court of Texas and the United States Court of Appeals for the Federal Circuit. Smith is a member in good standing of the bars of these courts.

5. More than eleven years have expired from the effective date of the suspension by the Tenth Circuit disciplinary panel. More than nine years have expired from the effective date of the disbarment by the Tenth Circuit disciplinary panel.

6. Based on the foregoing facts, reinstatement is appropriate under section 10.5 of the Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit. However, if the disciplinary panel is not so satisfied, Smith requests an evidentiary hearing by a special master on his petition for reinstatement.

On July 13, 2005, the Clerk of the Tenth Circuit dismissed Smith's Petition for Reinstatement and Request for Evidentiary Hearing, stating as follows:

. . .

> The petition is procedurally defective. In its opinion issued in 1993, the court stated, '[Smith] may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.' 10 F.3d at 724. The petition makes no such demonstration. Smith therefore may not apply for reinstatement. The 'Petition for Reinstatement and Request for Evidentiary Hearing' is accordingly DISMISSED.

On July 26, 2005, Smith filed the following Motion for Reconsideration and Request for Evidentiary Hearing.

> By Order dated July 13, 2005, a copy of which is attached hereto, this Court dismissed David L. Smith's Petition for Reinstatement and Request for Evidentiary Hearing, stating that 'the petition is procedurally defective' because it fails to 'demonstrate that each sanction order of this Court or the district court has been satisfied,' as required by this Court's suspension order issued in November of 1993.
>
> However, in late 1994 or early 1995, Mr. Smith's former attorney, Phillip S. Figa, submitted information to this Court in this case conclusively demonstrating that three out of four of these sanction orders have been satisfied through payment in full of these sanctions -- despite the fact that the sanctions were both harsh

and unjustified.[1] With respect to the sanction order in *Casillan v. Regional Transportation District*, this Court's disciplinary panel denied Mr. Smith's requests for an evidentiary hearing at which he would have had the opportunity to challenge the validity of this sanction order–a sanction order that this Court had previously refused to review on its merits.[2] Under these circumstances, Mr. Smith is entitled to, and should be afforded, an evidentiary hearing at which he has the opportunity to challenge the validity of the sanction order in *Casillan*. Alternatively, because of the numerous due process violations in this matter, Mr. Smith should not be required to demonstrate that the sanction order in *Casillan* has been satisfied before his Petition for Reinstatement is fully and fairly considered by this Court.

This Court's dismissal of Mr. Smith's Petition for Reinstatement and Request for Evidentiary Hearing violates section 10.5 of the Plan for Attorney Disciplinary Enforcement of the United

---

[1]This information is incorporated herein by reference for all purposes.

[2]This Court's disciplinary panel also denied Mr. Smith's request for an evidentiary hearing at which he would have had the opportunity to present his defenses to the charge that he practiced law in this Court in violation of this Court's suspension order. Mr. Smith is therefore entitled to, and should be afforded, an evidentiary hearing at which he has the opportunity to present his defenses to this charge.

States Court of Appeals for the Tenth Circuit, and deprives Mr. Smith of his First Amendment right to petition this Court for a redress of grievances and his Fifth Amendment right to due process of law. For these reasons, Mr. Smith requests an order granting his Motion for Reconsideration and Request for Evidentiary Hearing.

By Order dated July 26, 2005, the Clerk of the Tenth Circuit dismissed Smith's Motion for Reconsideration and Request for Evidentiary Hearing, stating that ". . . Mr. Smith may not apply for reinstatement to the bar of the U.S. Court of Appeals for the Tenth Circuit unless he first demonstrates that each sanction order from this court or the district court has been satisfied," and that "the motion to reconsider, like the original petition, fails in that regard."

On August 26, 2005, Smith filed his Petition for Court's Review of Clerk's Orders, arguing as follows:

. . .

Clearly, the Clerk was without authority to issue his Order dated July 13, 2005 or his Order dated July 26, 2005. Section 10.5 of the Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit provides as follows:

> The clerk refers petitions for reinstatement to the disciplinary panel. If the disciplinary panel is satisfied that reinstatement is appropriate based upon the findings of another court or otherwise, it will grant the petition. If the disciplinary panel is not so satisfied, the disciplinary panel may schedule a hearing by a special master on the petition. At the hearing, the petitioner has the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competency, and learning in the law required for admission to practice before this court and that his or her resumption of the practice of law will not be detrimental to the integrity and standing of the bar or to the administration of justice, or contrary to the public interest. The special master must submit a report and recommendation to the disciplinary panel who will act upon the petition.

By refusing to refer Smith's petition for reinstatement to the Tenth Circuit Disciplinary Panel for decision, as required by Section 10.5 of

the Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit, the Clerk deprived Smith of his First Amendment right to petition this Court for a redress of grievances and his Fifth Amendment right to due process of law.[3]

Assuming *arguendo* that the Clerk had the authority to issue his Order dated July 13, 2005 and his Order dated July 26, 2005, it is nevertheless clear that the Clerk abused his discretion and/or committed reversible error by stating that '. . . Mr. Smith may not apply for reinstatement to the bar of the U.S. Court of Appeals for the Tenth Circuit unless he first demonstrates that each sanction order from this court or the district court has been satisfied,' and that 'the motion to reconsider, like the original petition, fails in that regard,' while ignoring facts and arguments to the contrary. Considering the Clerk's history of refusing to refer Smith's petitions for reinstatement to the Tenth Circuit Disciplinary Panel, it is clear that his bias has prevented him from being a fair and impartial decision-maker with respect to Smith's Petition for Reinstatement and Request for Evidentiary Hearing.

. . .

For these reasons, Smith requests this Court to declare the Clerk's orders void *ab initio*, and to

---

[3]The record in this case shows that this is not the first time the Clerk has refused to refer Smith's petitions for reinstatement to the Tenth Circuit Disciplinary Panel for decision.

refer Smith's Petition for Reinstatement to the Tenth Circuit Disciplinary Panel for decision as required by section 10.5 of the Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit. Smith requests an evidentiary hearing by a special master if the Tenth Circuit Disciplinary Panel is not satisfied that reinstatement is appropriate.

By Order dated August 30, 2005, Tenth Circuit Judges Murphy and O'Brien denied the relief requested in Smith's Petition for Court's Review of Clerk's Orders, stating as follows:

. . .

This court has previously held that Mr. Smith 'may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.' *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993), *cert. denied*, 513 U.S. 807, *reh'g denied*, 513 U.S. 1033 (1994). Neither the original petition tendered July 8, 2005 nor the successive petition tendered July 26, 2005 demonstrate that each sanction order of this court or the district court has been satisfied. Accordingly, Mr. Smith is not eligible to apply for reinstatement, *Smith*, 10 F.3d at 724, and the clerk's office acted properly in not permitting Mr. Smith's application for reinstatement to be filed. To the extent Mr. Smith sought judicial review of a procedural order of the clerk's office, the 'Petition for Court's Review of Clerk's Orders' is

GRANTED. To the extent it seeks any other relief, it is DENIED. No petition or motion for reconsideration of this order may be filed.

It should also be noted that under Section 10.2 of the Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit, "[n]o petition for reinstatement may be filed within one year following an adverse determination on the attorney's petition for reinstatement."

The basis for federal jurisdiction in the court of first instance is the Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit.

ARGUMENT

Smith is being deprived of his right to apply for reinstatement to the Tenth Circuit bar on the basis of an impermissible condition, namely payment of harsh and unjustified sanctions imposed against him by the Tenth Circuit more than twelve (12) years ago without due process of law. This impermissible condition is not only

unrelated to Smith's qualifications or fitness to practice law; it amounts to judicial extortion–a clearly improper motive for depriving Smith of his right to apply for reinstatement to the Tenth Circuit bar.

In addition to the fact that Smith has already complied with this impermissible condition and/or has provided an adequate justification for his failure (if any) to comply therewith, the record in the Tenth Circuit shows that Smith is financially unable to pay the harsh and unjustified sanctions imposed against him by the Tenth Circuit. Furthermore, by requiring Smith to comply with this impermissible condition, while refusing to follow Section 10.5 of the Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit, *Tenth Circuit Judges Murphy and O'Brien deprived Smith* of his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law, as well as his First Amendment right to petition the Tenth Circuit

Disciplinary Panel for a redress of grievances. This is not the first time that the Tenth Circuit has deprived Smith of his constitutional and statutory rights without adequate justification.[4]

A writ of mandamus and/or prohibition will be in aid of this Court's appellate jurisdiction over the question of whether a circuit court of appeals may deny an attorney the right to apply for reinstatement to its bar for his failure (if any) to pay harsh and unjustified sanctions imposed against him more than twelve (12) years ago without due process of law. Exceptional circumstances warrant exercise of this Court's power of supervision. Adequate relief cannot be obtained in any other form or from any other court.

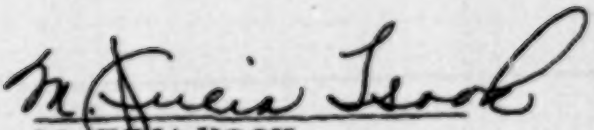
---

[4]The Tenth Circuit and its Clerk previously denied Smith's right to apply for reinstatement to the Tenth Circuit bar because he was attempting to proceed *pro se* under 28 U.S.C. § 1654. Because of his suspension and/or disbarment by the Tenth Circuit Disciplinary Panel, Smith was financially unable to hire counsel to represent him in this matter.

CONCLUSION

For these reasons, Smith requests issuance of a writ of mandamus and/or prohibition to the United States Court of Appeals for the Tenth Circuit, and such other and further relief as may be just under the circumstances, including an order reinstating him into the Tenth Circuit bar, as well as the bars of the United States Court of Appeals for the Fifth Circuit, the United States District Court for the District of Colorado, the United States District Court for the Northern District of Texas, and the Colorado Supreme Court. These courts suspended and/or disbarred Smith based on the transparently invalid suspension and disbarment orders of the Tenth Circuit, and have refused to reinstate Smith into their bars unless and until the Tenth Circuit reinstates Smith into its bar.

Respectfully submitted,



M. JULIA HOOK
5800 East 6th Avenue Parkway
Denver, Colorado 80220
303-321-7403

Counsel of Record for
Petitioner David L. Smith

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re DAVID L. SMITH,

No. 93-631

Petitioner.

ORDER

Filed August 30, 2005

Before MURPHY and O'BRIEN, Circuit Judges.

David L. Smith, by counsel, has filed a "Petition for Court's Review of Clerk's Orders" in which he seeks judicial review of orders of dismissal entered by the clerk's office in this proceeding. In sum, Mr. Smith tendered a petition seeking reinstatement to practice law before this circuit that was dismissed as procedurally defective. *See* Petition received July 8, 2005; Order filed July 13, 2005. A second petition seeking reconsideration

was similarly dismissed for the same reason. *See* Petition received July 26, 2005; Order filed July 26, 2005. Mr. Smith now asks that a judge overrule these orders and refer his petition seeking reinstatement to a disciplinary panel for consideration on the merits.

This court has previously held that Mr. Smith "may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied." *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993), *cert. denied*, 513 U.S. 807, *reh'g denied*, 513 U.S. 1033 (1994). Neither the original petition tendered July 8, 2005 nor the successive petition tendered July 26, 2005 demonstrate that each sanction order of this court or the district court has been satisfied. Accordingly, Mr. Smith is not eligible to apply for reinstatement, *Smith*, 10 F.3d at 724, and the clerk's office acted properly in not permitting Mr. Smith's application for reinstatement to be filed. To the extent Mr. Smith

sought judicial review of a procedural order of the clerk's office, the "Petition for Court's Review of Clerk's Orders" is GRANTED. To the extent it seeks any other relief, it is DENIED. No petition or motion for reconsideration of this order may be filed.

Entered for the Court
PATRICK FISHER, Clerk of the Court

by:
Douglas E. Cressler
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re DAVID L. SMITH,

No. 93-631

Petitioner.

ORDER

Filed July 26, 2005

By order dated July 13, 2005, David L. Smith's "Petition for Reinstatement and Request for Evidentiary Hearing" was dismissed for failing to comply with an express procedural prerequisite to filing such a petition imposed by the court. Smith has now tendered, again by counsel, a "Motion for Reconsideration and Request for Evidentiary Hearing." As the title of the pleading suggests, Smith seeks reconsideration of the order dismissing his petition for reinstatement.

The dismissal order was based on the express language of a published opinion of this court. With regard to Mr. Smith, the court has determined that he "may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied." *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993). Our records indicate that Mr. Smith sought rehearing of that order. Our rules expressly prohibit successive petitions for reconsideration. Tenth Cir. Rule 40.3.

Being therefore bound by that express directive from the court, the clerk has no authority to overrule it or to allow a successive request to reconsider the prohibition to be filed. Mr. Smith may not apply for reinstatement to the bar of the U.S. Court of Appeals for the Tenth Circuit unless he demonstrates that each sanction order from this court or the district court has been satisfied. The motion to reconsider, like the original petition, fails in that regard.

Accordingly, the "Motion for Reconsideration and Request for Evidentiary Hearing" is dismissed.

Entered for the Court
PATRICK FISHER, Clerk of Court

by:
Douglas E. Cressler
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re DAVID L. SMITH,

No. 93-631

Petitioner.

ORDER

Filed July 26, 2005

David L. Smith, by counsel, has filed a "Petition for Reinstatement and Request for Evidentiary Hearing." *Smith was previously suspended from practicing before* this court and that suspension was later converted into disbarment when Smith continued to practice before the court despite the suspension. *See In re Smith*, 76 F.3d 335 (10th Cir. 1996), *cert. denied*, 519 U.S. 871, *reh'g denied*, 519 U.S. 988 (1996); *In re Smith*, 10 F.3d 723 (10th Cir. 1993), *cert. denied*, 513 U.S. 807, *reh'g denied*, 513 U.S. 1033 (1994). Smith now seeks reinstatement to practice

before this court.

The petition is procedurally defective. In its opinion issued in 1993, the court stated, "[Smith] may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.". 10 F. 3d at 724. The petition makes no such demonstration. Smith therefore may not apply for reinstatement. The "Petition for Reinstatement and Request for Evidentiary Hearing" is accordingly DISMISSED.

Entered for the Court
PATRICK FISHER, Clerk of the Court

by:
Douglas E. Cressler
Chief Deputy Clerk

CONSTITUTION OF THE UNITED STATES, AMENDMENT 1

Congress shall make no law . . . abridging. . . the right of the people. . . to petition the government for a redress of grievances.

CONSTITUTION OF THE UNITED STATES, AMENDMENT 5

. . . [N]or shall any person be . . . deprived of . . .

liberty. . . or property, without due process of law. . . .

PLAN FOR ATTORNEY DISCIPLINARY ENFORCEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, SECTION 10.5

The clerk refers petitions for reinstatement to the disciplinary panel. If the disciplinary panel is satisfied that reinstatement is appropriate based upon the findings of another court or otherwise, it will grant the petition. If the disciplinary panel is not so satisfied, the disciplinary panel may schedule a hearing by a special master on the petition. At the hearing, the petitioner has the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competency, and learning in the law required for admission to practice before this court and that his or her resumption of the practice of law will not be detrimental to the integrity and standing of the bar or to the administration of justice, or contrary to the public interest. The special master must submit a report and recommendation to the disciplinary panel who will act upon the petition.